

Nos. 19-15566, 19-15662

United States Court of Appeals for the Ninth Circuit

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC
GRANT-IN-AID CAP ANTITRUST LITIGATION

SHAWNE ALSTON; MARTIN JENKINS; JOHNATHAN MOORE; KEVIN PERRY;
WILLIAM TYNDALL; ALEX LAURICELLA; SHARRIF FLOYD; KYLE THERET;
DUANE BENNETT; CHRIS STONE; JOHN BOHANNON; ASHLEY HOLLIDAY;
CHRIS DAVENPORT; NICHOLAS KINDLER; KENDALL GREGORY-MCGHEE;
INDIA CHANEY; MICHEL'LE THOMAS; DON BANKS, "DJ"; KENDALL
TIMMONS; DAX DELLENBACH; NIGEL HAYES; ANFORNEE STEWART;
KENYATA JOHNSON; BARRY BRUNETTI; DALENTA JAMERAL STEPHENS,
"D.J."; JUSTINE HARTMAN; AFURE JEMERIGBE; ALEC JAMES,
Plaintiffs – Appellees – Cross-Appellants,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, THE NCAA; PACIFIC 12
CONFERENCE; CONFERENCE USA; THE BIG TEN CONFERENCE, INC.; MID-
AMERICAN CONFERENCE; SOUTHEASTERN CONFERENCE; ATLANTIC
COAST CONFERENCE; MOUNTAIN WEST CONFERENCE; THE BIG TWELVE
CONFERENCE, INC.; SUN BELT CONFERENCE; WESTERN ATHLETIC
CONFERENCE; AMERICAN ATHLETIC CONFERENCE,
Defendants – Appellants – Cross-Appellees.

Appeals from the U.S. District Court
for the Northern District of California
The Honorable Claudia A. Wilken (No. 4:14-md-2541)

**NON-PARTIES ESPN, INC., ESPN ENTERPRISES, INC.,
AMERICAN BROADCASTING COMPANIES, INC., TURNER
BROADCASTING SYSTEM, INC., FOX BROADCASTING
COMPANY, LLC, FOX SPORTS HOLDINGS, LLC AND CBS
BROADCASTING INC.'S JOINT MOTION TO INTERVENE
PURSUANT TO FEDERAL RULE 24**

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Non-Parties ESPN, Inc., ESPN Enterprises, Inc. and American Broadcasting Companies, Inc. (collectively referred to as “ESPN/ABC”), Turner Broadcasting System, Inc. (“TBS, Inc.”), Fox Broadcasting Company, LLC and Fox Sports Holdings, LLC (collectively referred to as “Fox”), and CBS Broadcasting Inc. (“CBS”) (ESPN/ABC, TBS, Inc., Fox and CBS, collectively, referred to as the “Broadcasters”) will and hereby do respectfully seek leave to intervene in this matter pursuant to Federal Rules of Civil Procedure 24(a) and (b) for the limited purpose of filing a motion to seal the Broadcasters’ confidential information.

STATEMENT OF FACTS

On October 9, 2019, counsel for Plaintiffs informed the Broadcasters that Plaintiffs intended to file—by October 23, 2019—their brief in response to Defendants’ appeal and in support of their cross-appeal, and supplemental excerpts of the record. Plaintiffs represented that these filings would include information from documents that the Broadcasters designated “Network Strictly Confidential — Outside Litigation Counsel Only” (“NSC Information”) pursuant to the Protective Order in the District Court action and its

addenda (D. Ct. Dkt. Nos. 189, 234, 512, 539), and which was ordered sealed by the District Court based on motions to seal and supporting declarations filed by the Broadcasters in this matter (D. Ct. Dkt. Nos. 959, 1011, 1015, 1029, 1071, 1081-83, 1102, 1112-14). Therefore, Plaintiffs stated that they would file these materials under provisional seal pursuant to Federal Rule of Appellate Procedure 27(a).

The Broadcasters designated this information “Network Strictly Confidential — Outside Litigation Counsel Only” because it contains the highly confidential and proprietary terms of their media agreements with Defendants and certain sponsorship and corporate partnership agreements relating to an NCAA tournament (the “Media Rights Agreements”). The Broadcasters intervened or appeared¹ in the District Court action in this matter beginning in January of 2016 in

¹ TBS, Inc. was granted the same rights in the District Court action as the intervening Broadcasters through the third addendum to the protective order. Stipulation and Order Regarding Third Addendum to Stipulated Protective Order (“Protective Order-Third Addendum”) (D. Ct. Dkt. Nos. 539 at ¶3, 540). Additionally, the names of the relevant Fox entities have changed due to intervening corporate transactions.

order to maintain the confidentiality of this information during the discovery process, motion practice, and ultimately, at trial. (D. Ct. Dkt. Nos. 314, 325.) The parties did not oppose CBS, Fox and ESPN/ABC's intervention and the District Court granted those broadcasters' motions to intervene in February of 2016. (D. Ct. Dkt. No. 347.) Following their intervention, the Broadcasters spent months working and negotiating with the parties to enter into both stipulations governing redactions to be made to the Media Rights Agreements prior to their production in discovery, and stipulated orders governing the confidentiality of the Broadcasters' proprietary information both prior to trial and at trial. (*See, e.g.*, D. Ct. Dkt. Nos. 392, 534, 537, 499, 503.)

Throughout litigation at the trial court level, the District Court repeatedly held that the NSC Information the Broadcasters now seek to protect met the "compelling reasons" standard set forth in Ninth Circuit case law and ordered that it remain sealed. (*See, e.g.*, D. Ct. Dkt. Nos. 805, 959, 1011, 1029, 1102, 1112-1114.) The Broadcasters move to

intervene here in order to maintain the continued confidentiality of this information in these proceedings before the Ninth Circuit.

Accordingly, pursuant to Circuit Court Rule 27-13(f), the Broadcasters intend to file a sealing motion in this Court within 21 days from the date Plaintiffs make their filings. The Broadcasters recently learned that this Court granted Plaintiffs' motion for an extension until October 23, 2019 to make their filings (Dkt. No. 49), such that the Broadcasters' deadline to file a sealing motion likely will be November 13, 2019. The Broadcasters respectfully request disposition of this motion for intervention by November 12, 2019, so as to afford the Broadcasters sufficient time to file their sealing motion.

LEGAL STANDARD

"Intervention on appeal is governed by Rule 24 of the Federal Rules of Civil Procedure". *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997). Federal courts, including the Ninth Circuit, routinely approve permissive intervention under Fed. R. Civ. P. 24(b) to allow a non-party to be heard on matters of confidentiality. *See Beekman Indus., Inc. v.*

Int'l Ins. Co., 966 F.2d 470, 473-74 (9th Cir. 1992) (holding that independent jurisdictional basis and strong nexus of fact or law are not required where intervenor merely seeks to challenge a protective order); *accord Flynt v. Lombardi*, 782 F.3d 963 (8th Cir. 2015) (public interest in the “confidentiality of judicial records” is a question of law in common between the would-be intervenor and the parties to the original suit). Moreover, the Broadcasters meet the criteria for intervention under Fed. R. Civ. P. 24(a) due to their legally protected interests in keeping their competitive information confidential. *See Formulabs, Inc. v. Hartley Pen. Co.*, 275 F.2d 52, 56 (9th Cir. 1960).

ARGUMENT

The Broadcasters respectfully request that the Court permit their limited intervention for the purpose of sealing their confidential business information under FRCP 24(a) and (b).

First, the Broadcasters’ motion is timely. *See* Fed. R. Civ. P. 24(a), 24(b)(1). The Broadcasters first became aware on October 9, 2019 that their confidential information—which had previously been sealed by the

District Court—might become part of the public record. They filed this motion before such information was filed under provisional seal, and well before the deadline of 21 days after such filing by which they will be required to file a motion to maintain the seal.

Second, the Broadcasters file this motion to protect their interests in a very narrow and specific category of highly confidential information; revealing the non-public financial terms of their agreements with Defendants would cause them irreparable harm. “[A]ccess to judicial records is not absolute” and documents or records that “have traditionally been kept secret” are not subject to the right of public access. *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). A party must demonstrate that “compelling reasons” exist to protect confidential information from being disclosed to the public, and the District Court ruled that the Broadcasters sufficiently demonstrated the required compelling reasons to keep the confidential information at issue here under seal. *See id.* at 1179. (*See, e.g.*, D. Ct. Dkt. Nos. 805, 959, 1011, 1029, 1102, 1112-14.) For example,

the Broadcasters' contractual counterparties compete vigorously against one another to negotiate favorable financial terms with the various networks, which themselves attempt to negotiate the most favorable terms they can with certain Defendants and sponsoring companies. As such, if the financial terms of the Broadcasters' agreements with each Defendant are disclosed to the other Defendants, those other Defendants could use that information against the Broadcasters in future negotiations, effectively forcing the Broadcasters to give each Defendant the same (and, from the Broadcasters' perspective, the least favorable) contractual terms. Resolving such issues regarding confidentiality of judicial records is the same type of limited purpose for which this Court has allowed intervention in past cases. *See, e.g., Beekman*, 966 F. 2d at 473-74; *Formulabs, Inc.*, 275 F.2d at 56.

CONCLUSION

For these reasons, the Broadcasters respectfully request that the Court grant their motion to intervene in this matter pursuant to Federal Rules of Civil Procedure 24(a) and (b).

October 21, 2019

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Respectfully submitted,

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**CORPORATE DISCLOSURE STATEMENT OF
ESPN, INC., ESPN ENTERPRISES, INC. AND AMERICAN
BROADCASTING COMPANIES, INC.**

This corporate disclosure statement is made pursuant to Federal Rule of Appellate Procedure 26.1.

American Broadcasting Companies, Inc.'s ultimate parent is The Walt Disney Company, a publicly traded company.

ESPN Enterprises, Inc., is a wholly-owned direct subsidiary of ESPN, Inc.

ESPN, Inc., is a subsidiary of The Walt Disney Company, which is a publicly traded company that holds an indirect shareholder interest in eighty percent (80%) of ESPN, Inc. The Hearst Corporation indirectly holds the remaining twenty percent (20%) shareholder interest in ESPN, Inc.

**CORPORATE DISCLOSURE STATEMENT OF
TURNER BROADCASTING SYSTEM, INC.**

This corporate disclosure statement is made pursuant to Federal Rule of Appellate Procedure 26.1.

Turner Broadcasting System, Inc. is ultimately a wholly-owned subsidiary of AT&T Inc., a publicly traded corporation. AT&T Inc. has no parent company and, to the best of Turner Broadcasting System, Inc.'s knowledge, no publicly held company owns ten percent or more of AT&T Inc.'s stock.

**CORPORATE DISCLOSURE STATEMENT OF
FOX BROADCASTING COMPANY, LLC
AND FOX SPORTS HOLDINGS, LLC**

This corporate disclosure statement is made pursuant to Federal Rule of Appellate Procedure 26.1.

Fox Broadcasting Company, LLC is a wholly-owned subsidiary of Foxcorp Holdings LLC, which is a wholly-owned subsidiary of Fox Corporation. Fox Corporation is a publicly traded company.

Fox Sports Holdings, LLC is a wholly-owned subsidiary of Foxcorp Holdings LLC. Foxcorp Holdings LLC is a wholly-owned subsidiary of Fox Corporation. Fox Corporation is a publicly traded company.

CORPORATE DISCLOSURE STATEMENT OF CBS BROADCASTING INC.

This corporate disclosure statement is made pursuant to Federal Rule of Appellate Procedure 26.1.

CBS Broadcasting Inc. is a subsidiary of CBS Corporation. CBS Corporation is a publicly traded company. National Amusements, Inc., a privately held company, beneficially owns the majority of the Class A voting stock of CBS Corporation. Otherwise, with respect to ownership of the Class A voting stock of CBS Corporation in the amount of over 10%, CBS Corporation is only aware, without inquiry, of the following information based upon filings made pursuant to Section 13(d) or Section 13(g) of the Securities and Exchange Act of 1934, as amended: according to a Schedule 13D/A, dated and filed with the Securities and Exchange Commission on April 24, 2019, GAMCO Investors, Inc., along with certain entities and persons affiliated therewith (any of which may be publicly held), held shares representing, as of April 12, 2019, approximately 13.43% of CBS Corporation's Class A voting stock, based on such Schedule 13D/A.

CERTIFICATE OF COMPLIANCE

This certification is made pursuant to Fed. R. App. P. 32(g). This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 1263 words.

As required by Fed. R. App. P. 27(d)(1)(E), this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2019, I electronically filed the foregoing documents with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

/s/ Evan R. Chesler

Evan R. Chesler